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EMPLOYMENT TRIBUNALS

Claimant

Mrs I Kaneva

Respondents

AND

NSL Ltd

Heard at: London Central

On:

22-24 July 2019

Before: Employment Judge J Burns
Members Mrs J Griffiths and Mr DL Eggmore

Representation

For the Claimant: In person

First Respondent: Ms L Whittington, of Counsel

REASONS¹

1. This is a claim of unfair dismissal and direct discrimination contrary to s.13 of the Equality Act 2010 on the grounds of race and/or marital status.
2. The Claimant states that she is Bulgarian and a “*white other*”. She compares her treatment in having been dismissed with that of a specific white British comparator, who we refer to in these reasons as “RM”. The Claimant is married and she also complains that she was blamed and disciplined for her husband’s misconduct.
3. We heard evidence from the Claimant and then from the Respondent’s witnesses as follows: Mr S Palmer, (Investigator), Ms L Ranger (who made the decision to dismiss), Mr N Willis (who heard the Claimant’s unsuccessful appeal against dismissal) and then Mr J Perry (who adduced some hearsay evidence in relation to the comparator RM and in relation to another case at page 187 of the bundle). The joint bundle contains 196 pages and some additional pages were handed in relating to the comparators.

¹ Typed upon 30/12/2019 from a digital recording of the oral reasons given at the end of the hearing on 24/7/2019.

Findings of Fact

4. The Respondent company provides parking enforcement and management services to various local authorities including Islington Council. The Claimant was employed from 26 March 2012 and by 2018 she was at team leader with responsibility for about twenty Civil Enforcement Officers (“CEOs”). She worked from a building in Old Street, London in the Borough of Islington.
5. On 11 July 2018 Mr Ryan Rodriguez, a Principal Contract Manager at Islington Council, contacted Neil Hutchins, Accounts Director within the Respondent. Mr Rodriguez reported that he had seen a disabled blue parking badge displayed in a car which he believed to belong to the Claimant. Mr Rodriguez had discovered that the blue badge was invalid having been issued originally by Westminster Council but subsequently cancelled.
6. Mr Rodriguez previously had worked for Islington Council in the same building as that occupied by the Respondent in Old Street and he remained on friendly terms with a colleague in the building and he recognised the Claimant’s car as a consequence of his frequent visits to and ongoing interest in Old Street.
7. Having received this communication from Mr Rodriguez, Mr Hutchins asked Mr Palmer to go to Old Street to meet with Mr Rodriguez which he did. Mr Rodriguez showed Mr Palmer photographs, (pages 66-67) and video footage which Mr Rodriguez had taken the previous day i.e. on 10 July. The two of them then walked to a location in Windsor Terrace, which is a public road in Hackney about a ten-minute walk away from Old Street, where the car in question, namely a black Honda registration RF07 AAO, was seen parked in a bay with the invalid blue badge on display. Mr Palmer took further photographs (pages 89-91) and then returned to the office.
8. Mr Rodriguez sent an email later that day on 11 July, (page 78) which reads as follows: *“Last week on my journey to Old Street base I had to make a detour to reach City Road via Windsor Terrace (LB Hackney ten minutes’ walk to Old Street base). I recognised a vehicle from the service road in Old Street where Council and NSL staff use to park. I stopped to investigate and found a blue badge issued by Westminster on display. The vehicle was a black Honda RF07 AAO which I knew belonged to a Team Leader at Old Street base, Ivanka. On 9 July I was parked on the service road at 29-33 Old Street and shortly after 6pm observed the same vehicle being driven by Ivanka into the service road and park in one of the bays. On Tuesday 10 July at 10:30am I drove to Windsor Terrace to observe the black Honda parked in a bay displaying the Westminster-issued disabled badge, I subsequently returned to WRC Cottage Road and enquired serial number with Westminster CC. They informed me the badge had been cancelled and should not be in use. I returned to Windsor Terrace at 5:30pm and filmed Ivanka return to the vehicle around 5:50pm in NSL/Islington uniform. On Wednesday 11 July at 10am I attended site with Steven Palmer NSL to observe the same vehicle parked in a different bay in Windsor Terrace displaying the Westminster*

disabled bay². Footage was taken from my personal and work mobile phones and I will supply footage in a separate email. I have informed my Head of Service, Nicollena Cooper and would like the strongest action taken and also the blue badge seized immediately so it can be returned to Westminster City Council and they can decide on further prosecution”.

9. Subsequently, Mr Rodriguez sent in some photographs and subsequent to that during the course of the disciplinary hearing Ms Ranger obtained CCTV evidence from Islington Council of the service road in Old Street.
10. The photographic and video evidence which finally became available to the Respondent is as follows:
 - in relation to 9 July, CCTV footage of the service road in Old Street taken at approximately at 6pm, in which the Claimant is seen arriving in the said vehicle, reversing the vehicle into a disabled parking bay and parking it there. The CCTV footage does not show one way or the other whether the blue badge was on display at that time.
 - In relation to 10 July,- photographs taken by Ryan Rodriguez,- at various times of the day, - the earliest photograph appears to have been taken and sent on to NSL by Mr Rodriguez at about 7:42am, (pages 56 and 95). Other photographs were taken at 10:05am, (pages 123 and following). These photographs are of views of the car in Windsor Terrace with the blue badge on display but not the Claimant present or visible in the shots.
 - At 6pm on the same day (10 July) Mr Rodriguez took the video footage in Windsor Terrace which does not show the blue badge in shot at all (as the footage was filmed from a distance), but it shows the Claimant approaching the vehicle on the passenger side, opening the door, reaching in, doing something inside the car, withdrawing from that side of the car, going around and entering the car and sitting down behind the steering wheel; and then at that point the video footage ends.
 - On 11 July further photographs were taken by Steve Palmer, not with the Claimant present, showing the car parked in Windsor Terrace once again with the blue badge on display.
11. In summary the above evidence shows the Claimant in and about the vehicle on three consecutive days, the first day being in the service road of Old Street on 9 July; and then on 10 and 11 July 2018 in Windsor Terrace, but in no instance, - in so far as the photographic and CCTV footage is concerned - are the Claimant, the vehicle and the blue badge all shown present together at the same time. However, on both the 10 and 11 July, when the photographers approached the car in the Claimant’s absence, the invalid blue badge was on display.

² (bay should read badge)

12. The Claimant was invited to a preliminary investigatory interview with Steve Palmer on 11 July, and the discussion was noted down (pages 82-83). We find that it is an accurate minute. When asked the Claimant readily confirmed that the vehicle was hers, and she did not deny that the blue badge had been displayed in the vehicle and when asked the first time by Mr Palmer about the blue badge her immediate response was *"it is not our own its our neighbour's"*. She went on to say that the neighbour was a Polish man who had given the blue badge to her husband but apart from this she did not know where the badge had come from. She went on to suggest that it was her husband who had parked the car in Windsor Terrace the previous day but she did not know when.
13. Mr Palmer asked her if she would surrender the badge so it could be seized by Islington on behalf of Westminster. The Claimant declined saying *"no, I have to return him"*. And *"it's not my badge, I have to bring it back to the person it belongs to"*.
14. Following the termination of that interview the Claimant was suspended on full pay and the preliminary charges were formulated in a letter (page 84). The investigation at that stage was into the following allegations that *"you brought the company into serious disrepute, breach of trust and confidence and refused reasonable management instruction"*. The latter part of the charge refers to the Claimant having declined to return the blue card when she had been asked by Mr Palmer to do so.
15. On 12 July Mr Rodriguez was sent Mr Palmer's notes of his interview with the Claimant. Mr Rodriguez, having read them, sent an email (page 92) in the evening to Mr Palmer which reads as follows: *"Further to a copy of the interview notes I am concerned that the member of staff is attempting to lessen the serious nature of the incident. We view this matter as gross misconduct as it could have brought Islington Council into disrepute with an employee in uniform committing fraud. Further it is a complete breakdown of trust between Islington and the member of staff in question. I would also add the position of the NSL employee in an enforcement position is unattainable. The matter of fraudulent use of the blue badge itself has been passed onto our fraud team to liaise with Westminster City Council, I wish that the above be noted when compiling the case notes for the disciplinary"*.
16. The next day an invitation to a disciplinary hearing was issued with the same allegations mentioned in paragraph 14 above, but in addition the following had been added, presumably as a result of Mr Rodriguez's input, namely *"using your knowledge to defraud Hackney Council by misusing a blue badge to park your private vehicle for free"*.
17. The disciplinary hearing took place on 18 July conducted by Ms Ranger, and a note (page 96) was taken which we regard as accurate.
18. The Claimant said that the car belonged to her husband, and that she had not driven the car at all on 9 July. She produced a mini-cab receipt for £18.50

dated 8:10am for 9 July in support of her suggestion that she had not driven to work but had been transported there in a mini-cab on 9 July.

19. She said that the blue badge had been given to her husband not by a neighbour but by “a Polish guy” who had “approached her husband from outside” and that she previously just assumed that it was a neighbour.
20. She said that she had known nothing about any blue badge until the moment when she was asked about it at the investigatory meeting by Mr Palmer and it was only after that, that she had raised the issue with her husband.
21. The Claimant queried the date on some of the photographs, and about the time of day at which some of the photographs taken by Mr Rodriguez had been taken. There had been a discrepancy as to whether they had been taken early in the morning or later in the morning on 10 July.
22. Ms Ranger adjourned the disciplinary hearing to make further enquiries. In relation to the timing of the photographs Ms Ranger contacted Mr Rodriguez and obtained further information about this which satisfied her that at least some of the photographs had been taken at about 10:05am on 10 July as indicated. In relation to whether or not the Claimant had driven on 9 July she obtained the CCTV footage from Islington which shows the Claimant driving into and parking in Old Street on that day.
23. Ms Ranger then resumed the disciplinary hearing on 13 August and presented this additional information to the Claimant.
24. The Claimant then said that she could not remember whether or not she had driven on 9 July and she went on to argue that the obtaining of the CCTV footage had been an invasion of her privacy. She also stated, (page 134) that she had never seen the blue badge previous to being confronted about the matter and shown the photographs by Mr Palmer on 11 July.
25. Having concluded the disciplinary hearing, Ms Ranger then sent on 17 August a letter (page 136 etc) summarily dismissing the Claimant for gross misconduct. The letter was sent as an email attachment, and the Claimant said she never received a paper version, but the Tribunal does not regard that as a significant point.
26. The dismissal letter gives reasons for the rejection of the Claimant’s version of events and highlights a number of inconsistencies in the Claimant’s account, in relation to issues such as where the blue badge had come from, the Claimant’s previous awareness of it, whether or not she had driven on 9 July, who else had driven the car etc.
27. The Claimant appealed, by writing a lengthy letter of appeal which starts at page 141. Mr Willis, who dealt with the appeal, obtained help from HR in analysing and summarizing the matters raised. He explained to us that in dealing with the appeal he focused on three main points. The first was whether there was any additional evidence which had to be considered

subsequent to the decision to dismiss, the second was whether there was any procedural error in the process, and the third was whether the sanction was appropriate.

28. In her letter of appeal, the Claimant had raised the issue of unfair and possibly discriminatory treatment and also had argued that she was being blamed because of her husband or because she was married etc. She also raised the issue of the comparator. On page 150 under a heading of her appeal document entitled "*employers should act consistently*" she had written as follows: "*An ex-team leader who did a gross misconduct for similar breaches in the NSL handbook walk away with a company car and a promotion not very consistently I would say ACAS isn't that right*". That was a reference to her comparator RM.
29. We find that on the whole Mr Willis conducted the appeal reasonably well but it would have been sensible and better if he and/or HR had taken the opportunity at the appeal to explore the comparator/claimed inconsistency issue in relation to RM (which they did not do). Inconsistency can in itself create unfairness in a dismissal. The Claimant had raised the issue and it should have been properly looked into at the appeal stage so that some substantive and reasoned response could have been given. Instead Mr Willis simply wrote (page 183) "*I can't comment on other colleague's cases but I can assure you again that we treat each case on its own merit and your circumstances were total different from any other case in the contract*". That was not really good enough as further explanation was required if only to reassure the dismissed Claimant that there was no inconsistency or discrimination in play.

The Law

30. When dismissing fairly for misconduct firstly the employee has to establish a potentially fair reason for dismissal under s.98 of the Employment Rights Act 1996 at which point s.98(4) must be considered which provides as follows: "*where the employer has fulfilled the requirements of sub section 1 (i.e. has identified a potentially fair reason for dismissal) the determination of the question whether the dismissal is fair or unfair having regard to the reason shown by the employer, depends upon whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case*".
31. The case BHS v Burchell 1978 IRLR 378/379 established that a dismissal for misconduct will not be unfair if it is based on a genuine belief on the part of the employer that the employee has perpetrated misconduct, which belief is based on reasonable grounds, and following a reasonable investigation.
32. HSBC v Madden 2000 ICR 1283 states that an Employment Tribunal should not substitute itself for an employer or act as if it were conducting a rehearing of or an appeal against the merits of an employer's decision to dismiss. The

employer not the Tribunal is the proper person to conduct the investigation into the alleged misconduct. The role of Tribunal is to decide whether that investigation is reasonable in the circumstances and whether the decision to dismiss in the light of the result of that investigation is a reasonable response.

33. Sainsbury v Hitt 2002 Court of Appeal Civ 1588 states that *“the range of reasonable responses test, or to put it another way the need to apply the objective standards of the reasonable employer, applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason”*
34. The ACAS code of practice for disciplinary and grievance procedures 2009 lays down recommendations for good practice by employers. It provides that an employer wishing to discipline an employee should carry out an investigation to formally establish the facts, then inform the employee in writing of the problem, then, after a proper interval, hold a meeting to discuss the problem, decide fairly on the appropriate action and provide an opportunity to appeal.
35. Section 4 of the Equality Act 2010 provides that amongst other things race and marital status are protected characteristics and s.13 (which deals with direct discrimination) provides that a person discriminates against another if because of a protected characteristic he treats another less favourably than he treats or would treat others. The requirement is on the Claimant to show less favourable treatment by comparison with an actual or hypothetical comparator whose relevant circumstances must be the same or not materially different.
36. Section 136 provides that if there are facts from which a Court could decide in the absence of any other explanation that a person has contravened a provision under the Equality Act, then the Court must hold that the contravention occurred unless the person shows that he did not contravene the provision.

Conclusions re claim that the dismissal was unfair

37. In relation to the claim that the dismissal was unfair, we find that the Respondent's managers genuinely believed that the misconduct (ie the Claimant's abuse of the blue card) had occurred. The genuine belief was held by Ms Ranger and by Mr Willis.
38. It is clear that Mr Rodriguez initiated the investigation and that he took an interest in it and sent a follow up email on 12 July which probably caused the fraud element of the allegations to be added to the disciplinary process. During her evidence when she was asked about this the Claimant was unable to suggest any reason why Mr Rodriguez should be *“out to get”* the Claimant and she told us that previously she had been on cordial terms with Mr Rodriguez and had said good morning to him etc. when she saw him coming in and out of the building at Old Street.

39. In her final submissions, but not in her evidence, the Claimant started speculating about Mr Rodriguez having wanting to get rid of her (the Claimant) as a Team Leader so that Mr Rodriguez's girlfriend (who is/was apparently also employed by the Respondent) could be promoted into the Claimant's position. There was no evidence whatsoever to support that.
40. The Claimant resents Mr Rodriguez's involvement but he would have had a legitimate interest in ensuring that the Respondent's staff, and particularly those in uniform, were not perpetrating fraud with blue badges, not least because such fraud could cause considerable reputational damage to the Council. We do not find on the evidence that Mr Rodriguez had any sinister or ulterior motive in reporting the matter to the Respondent in the first place.
41. After his involvement up to 12 July we cannot see that he got involved in the process thereafter, and we accept that Ms Ranger and Mr Willis acted independently and brought in reasonable decisions based upon the evidence before them and were not simply rubber-stamping Mr Rodriguez's wishes.
42. The next question is whether there was reasonable evidence to support their belief. The main point is that the Respondent did not have direct evidence of the Claimant sitting in or driving the car with the blue badge on display. She was not caught "red-handed". The Claimant submits that the Respondent did not prove that she (rather than her husband) in fact used the blue badge at all. She says that the Respondent simply drew inferences from the photographic evidence. Her case is that the inferences were unjustified.
43. It is true that the Respondent's managers drew inferences from the photographic and CCTV footage and that this evidence is circumstantial. It shows the Claimant in and about and evidently using the car on three consecutive days in July 2018, and at other times, on at least two of those same days, that the blue badge was prominently on display in the car. The inference which the Respondent drew from that was that it was the Claimant who was using the car and using the blue badge to park it.
44. In a criminal trial, matters have to be proved beyond reasonable doubt, but in a civil employment matter, where an employer is considering misconduct, the standard of proof is not beyond reasonable doubt but is instead on a balance of probabilities – ie the proper question for the Respondent in this case was "*was it more likely than not that the Claimant was using the blue badge?*". In answering that question circumstantial as well as direct "red-handed" evidence was admissible.
45. The Respondent did not rely only on circumstantial photographic/CCTV evidence. It also had Mr Rodriguez's email of 11 July, and it had the Claimant's answers in interview in which there were conspicuous inconsistencies. The main one was that when first confronted with the "blue badge use" issue by Mr Palmer on 11 July, the Claimant did not express any surprise, and her answers were given on the basis that she knew all about the blue badge already, including that her husband had been using it, and that it

came from a neighbour; but by the time she got to the second leg of the disciplinary hearing she was distancing herself completely from the blue badge and claiming that she knew nothing about it until she was confronted with it and with photographs of it by Mr Palmer on 11 July. That was a notable discrepancy, but it was not the only one. For example, another discrepancy was the Claimant's first denial that she had driven on 9 July, which she retracted when confronted by the CCTV evidence.

46. In our view, taken together with the discrepancies, the photographic/CCTV evidence formed a reasonable objective evidential basis for the Respondent's conclusion on the balance of probabilities that the Claimant had deliberately on the days under examination by the Respondent (and whether or not her husband had also done so on other occasions) used the invalid blue badge which she was not entitled to.
47. In considering the adequacy of the evidence against the Claimant, and also whether the Respondent's disciplinary procedure was reasonable, we have considered whether, and if so to what extent, the Respondent should have tried to obtain evidence from the Claimant's husband.
48. It is evident that when Ms Ranger asked the Claimant about her husband and her husband's business, the Claimant had not been particularly helpful or cooperative in response. Ultimately the Claimant did not produce a statement from her husband or any evidence to show that she had even discussed the matter with him, let alone asked him to give evidence to the Respondent on her behalf. Clearly if the husband had volunteered to be interviewed by the Respondent, or had provided a statement going into details in which he confessed that he was the guilty party who had been using the blue badge on the days in question, then that would have been a different case, but that did not happen.
49. In these circumstances, we do not think that it is reasonable to expect the Respondent to have written directly and unilaterally to the Claimant's husband to try to get evidence from him. This could have led to many unforeseen unfortunate outcomes. Perhaps Ms Ranger could have been more positive in suggesting to the Claimant that it might assist her defence if the husband came forward to back up her story or produce some evidence of his own. However, the Claimant herself would have known very well that evidence of that type from her husband might be potentially valuable. Hence both parties could have been more proactive in getting evidence from the husband, and both parties may have had good reasons for not doing so.
50. Having taken account of the foregoing and all other facts and arguments raised before us, we find that the disciplinary procedure was fair and in accordance with the ACAS code.
51. In relation to the sanction (summary dismissal), the Claimant submits that her six-and-a-half-year's clean record was not taken into account, and indeed it is not clear from the decision letters that it was considered. However, a summary dismissal can be appropriate even if there is a clean record prior to

the gross misconduct. On the Respondent's reasonable findings, the Claimant was guilty of gross misconduct of a type which was particularly intolerable, given her responsible position in charge of CEO's. We find that summary dismissal was within a range of reasonable responses.

52. So, for these reasons we find that the dismissal was fair.

The discrimination claims

53. The race claim is based entirely upon the proposition that the Claimant's comparator RM (who was a white British woman) was treated more leniently in 2017 in comparison with how the Claimant (a "Bulgarian white other") woman was treated in 2018.

54. We had some difficulty getting evidence from the Respondent about RM who had not been even mentioned in its principal witness statements, and the only document about this was a letter which was heavily and inappropriately redacted in the bundle.

55. The Claimant however produced the unredacted disciplinary and appeal letters relating to RM and only after that did the Respondent then produce, through the late statement of Mr Perry, a bundle of further extracts from the investigation file into RM. This statement we allowed in as it covered additional disclosure which we ourselves had called for to assist us to make sense of the RM comparator claim. A further unsatisfactory aspect of the Respondent's approach to the RM issue was that the person who disciplined RM was potentially available as a witness before us but for some undisclosed reason had not been called by the Respondent to come to the Tribunal to give evidence. We are unhappy with the way this issue has been approached by the Respondent but bear in mind that the onus of proof is at least initially on the Claimant to prove her comparator case.

56. Ultimately we had sufficient evidence to make the following limited findings about RM's case: she was an employee of the Respondent who was initially investigated over a potentially very serious matter – namely that she had pressed a junior member of staff to produce a fraudulent vehicle accident report - which was then presented to an insurance company - as a consequence of which RM got her car - which was not actually involved in the accident - repaired for free or rather repaired at the cost of the Respondent. There had been a second related allegation - namely that the said RM had accepted a watch as a present from the junior employee concerned.

57. These matters were investigated and the outcome was that on 5 July 2017 RM was given a final written warning following a lengthy discussion with her about the fact that it was inappropriate for her to have accepted a watch as a gift from a member of staff in a junior position to her.

58. In so far as the investigation into the alleged insurance fraud by RM is concerned we have read the following in the outcome document: "*With regard to the incident the result of the damage to your car while this raised concerns*

I feel that my outstanding questions in relation to this matter do not allow me to fully conclude this issue. On this basis I therefore find that there is no case to answer. I will feed-back separately regarding this as I do have some follow up learning points from this". This is somewhat unsatisfactory in that it suggests that the insurance fraud is being dropped because there is no case to answer but on the other hand the author of the outcome document stated that he or she was going to make some further enquiries. We do not know what became of the further enquiries but there is no evidence that the insurance fraud was ever proven. The result in relation to that was "no case to answer".

59. Hence we find on the available evidence that RM was not found guilty of fraud whereas the Claimant was. (Using an invalid blue badge makes the fraudulent representation that the driver of the car is entitled to free parking and it defrauds the Council from the parking fees or fines which would otherwise have to be paid by the driver). In the end RM was found guilty only of accepting a watch unwisely, which was far less serious than the Claimant's misconduct. Therefore RM is not a good comparator because she was in a materially different position from the Claimant.
60. The Respondent produced a comparator of its own. A redacted version of the dismissal letter relating to this comparator appears at page 187. We have not been told the name of the culprit but we find that he was a white British male whom the Respondent dismissed late last year, (ie 2018). He owned and was entitled to a blue badge but misused it by staying for too long and breaking the blue badge rules in a particular parking spot, which misconduct he had admitted. This was far less serious than the Claimant's misconduct but that culprit was dismissed. This indicates that the Respondent has responded recently and at least equally severely to a white British comparator as it did to the Claimant in relation to misuse of blue badges.
61. We dismiss the direct race discrimination claim because the only useful comparator was also dismissed and we find that a hypothetical comparator of a different race to the Claimant but otherwise in the same material circumstances would also have been summarily dismissed.
62. Insofar as the claim of direct discrimination on the grounds of marital status discrimination is concerned, we find as follows: it is perfectly clear that the Claimant was not disciplined or dismissed because she was married, or because the Respondent thought that her husband was guilty of blue-badge abuse. It was the Claimant who brought her husband into the matter and not the Respondent. The Claimant was disciplined because the Respondent concluded that it was the Claimant who had used the blue badge and it did not accept her story that it had been her husband who had been doing so on the days in question. This had nothing to do with her marital status. She has not shown that she has suffered less advantageous treatment than a person in the same position who was of a different marital status. Had the Claimant not been married but was blaming some other third party whom she was not married to she would have been treated in exactly the same way.

63. We do not find that the first stage of in s.136 of the Equality Act has been satisfied because the Claimant has not adduced facts which transfer the burden of proof to the Respondent. If we should have found that she had transferred the burden of proof, we are in any event satisfied with the Respondent's non-discriminatory explanations for the dismissal.

64. So, for these reasons the claims failed.

Employment Judge Burns

Dated: 31 December 2019

Sent to the parties on: 02/1/2020

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For the Tribunal Office